

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BROCADE COMMUNICATIONS SYSTEMS,)
INC., a Delaware corporation, and FOUNDRY)
NETWORKS, LLC, a Delaware limited liability)
company,)

Plaintiffs,)

v.)

A10 NETWORKS, INC., a California)
corporation, LEE CHEN, an individual,)
RAJKUMAR JALAN, an individual, RON)
SZETO, an individual, LIANG HAN, an)
individual, STEVEN HWANG, an individual,)
and DAVID CHEUNG, an individual,)

Defendants.)

Case No.: 10-CV-03428-LHK

ORDER DENYING APPLICATION FOR
TEMPORARY RESTRAINING ORDER

Plaintiffs Brocade Communications Systems, Inc. and Foundry Networks, LLC (together, Brocade) filed an application for a temporary restraining order (TRO) based on alleged copyright infringement and trade secret theft by defendants (collectively, A10). This matter was heard on August 12, 2011.¹ For the reasons set forth below, this Motion is DENIED without prejudice.

¹ On August 15, 2011, Brocade submitted a “Notice Regarding A10 Supplemental Authority and Modified Proposed Order for Temporary Restraining Order.” Nothing in this late filing changes the Court’s analysis here. In addition, A10 moved to file a number of supplemental declarations after Brocade filed its reply in support of its application for TRO. *See* Dkt. No. 165. For the reasons discussed in this Order, the Court did not find it necessary to rely on the information submitted in those supplemental declarations. Accordingly, A10’s request for leave to file the supplemental declarations is DENIED.

Brocade asserts that it has found evidence of literal copying of its copyrighted and trade-secret-protected source code in A10's AX Series products. Based on this, Brocade argues that it is entitled to enjoin sales of A10's AX Series application servers, and to require that A10 notify existing AX Series customers that their application servers might be subject to recall if Brocade is successful in proving its claims in this litigation. After the hearing on this application, Brocade submitted a revised Proposed Order which also sought a certification from A10's existing AX Series customers that they had installed A10's revised source code, discussed further below.

A party seeking injunctive relief, including a TRO, must establish four elements before such relief can be granted. These are: (1) that the party is likely to succeed on the merits; (2) that the party is likely to suffer irreparable harm absent injunctive relief; (3) that the balance of equities tips in the moving party's favor; and (4) that the injunction is in the public interest. *Perfect 10, Inc. v. Google, Inc.*, No. 10-56316, 2011 U.S. App. LEXIS 15913 at *5 (9th Cir. Aug. 3, 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Regarding likelihood of success on the merits of its copyright claim, Brocade has introduced evidence that A10's code contains near-verbatim copies of three of its code routines, which it has registered for copyright protection. Overall, Brocade has shown that approximately 120 lines of its copyrighted source code appear in the latest version of the AX Series code.² In support of its application for TRO, Brocade argued that this evidence of copying was enough to raise a likelihood of success on the merits of its copyright claim. In opposition to Brocade's application, A10 argued that Brocade must show copying of *protectable* expression in order to establish a likelihood of success of proving copyright infringement, and suggests that Brocade has not carried its burden to show what protectable expression has been copied. *See* Opp'n at 13-15. As A10 notes, the Ninth Circuit has used an "abstraction/filtration/comparison" test to help separate protectable and non-protectable elements in the context of computer software. *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706-11 (2d Cir. 1992). In its reply in

² Brocade has also introduced evidence that a number of lines of third-party code, licensed by Brocade and used in Brocade's source code, also appear in A10's AX Series devices. Brocade confirmed at the hearing on this matter that it has no copyright interest in this third-party code and therefore no standing to enjoin A10's alleged use of it.

support of its TRO application, Brocade argues that the abstraction/filtration/comparison test is not required when literal copying is shown, but that even if this test is used, Brocade has demonstrated a likelihood of success. *See Reply* at 11.

Brocade's argument that the abstraction/filtration/comparison test is not strictly required might be correct. However, the Ninth Circuit has found this test useful in separating protectable and non-protectable expression in the software copyright context. "[T]he party claiming infringement may place no reliance upon any similarity in expression resulting from unprotectable elements." *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994). However, it is also true that if Brocade registered its software within 5 years of publication, this entitles Brocade to a presumption of validity, and shifts the burden to A10 to rebut that the allegedly copied elements are not protectable expression.³ *Merch. Transaction Sys. v. Nelcela, Inc.*, No. CV 02-1954-PHX-MHM, 2009 U.S. Dist. LEXIS 25663, at *26-27 (D. Ariz. Mar. 17, 2009); 17 U.S.C. § 410(c). The evidence presented here suggests that at least some of the copied code is likely protectable expression. For example, Brocade submitted evidence that A10's software code contains verbatim copies of "developer comments," which Brocade argues are present in the code only to "explain the structure of the source code." TRO App. at 3. Since these notes are the equivalent of explanatory asides, they are likely capable of being expressed in many different ways and therefore may be protectable expression.

In its opposition to Brocade's application for TRO, A10 claims that it has completely rewritten the accused code using clean room conditions. *See Opp'n* at 2-4. Therefore, A10 argues, Brocade's request for a TRO is moot, because even if there is a likelihood of proving copyright infringement or trade secret misappropriation based on A10's previous code, there can be no infringement or improper use by its rewritten code. Unfortunately, A10 did not produce the rewritten code to Brocade until the day before the hearing on this matter, leaving Brocade and the Court in the dark about how the rewritten code changes the analysis, if at all.

³ Brocade did not address the presumption of validity and the prerequisites to such a presumption, and A10 did not attempt to rebut such a presumption. However, the evidence does suggest that Brocade's code is likely protectable expression.

Further complicating the question presented, Brocade argued in its briefing that proof of likelihood of success on its copyright infringement claim would raise a presumption of irreparable harm, but the Ninth Circuit has recently overruled this standard. *Perfect 10*, 2011 U.S. App. LEXIS 15913 at *12. Instead, a party seeking a TRO or PI based on alleged copyright infringement must demonstrate both a likelihood of success on the merits *and* that it is likely to suffer irreparable harm. *Id.* In support of the likelihood of irreparable harm, the party must show “a sufficient causal connection between irreparable harm” and the accused infringement. *Id.* at *15. Brocade argued, in the alternative, that it could prove likely irreparable harm based on A10’s competition with Brocade. Brocade submitted the declaration of Keith Stewart, the director of product management for application delivery controllers at Brocade, who is responsible for marketing the ServerIron ADX product line (which competes with A10’s AX Series). Mr. Stewart declared that Brocade stands to lose business from three of its previous customers, and that this loss could extend for 3-7 years because 40% of Brocade’s business is servicing its products for customers after the initial sale. However, Brocade did not attempt to show a *specific* causal connection between copying of protectable expression and the alleged irreparable harm, as contemplated by the *Perfect 10* decision.

For example, Brocade did not submit a declaration from a customer indicating that the protectable expression in the accused infringing code implements a function that is required or desirable in a competitive product. While the *Perfect 10* court did identify all the ways a party seeking injunction might demonstrate the causal connection between infringement and injury, it is clear that some evidence linking the infringement with the asserted irreparable harm is required. The Court notes that while Brocade asserts that A10 must have copied more of Brocade’s code in earlier versions of its AX Series source code, giving A10 an ongoing and unfair advantage, there is no evidence of this before the Court at this time. Without some evidentiary support, this allegation is insufficient to show irreparable harm.

In addition to Brocade’s application for TRO, the Court heard a number of other motions, including Brocade’s motion to compel A10’s production of prerelease versions of its source code. Brocade’s theory is that A10 used Brocade’s source code in development of the AX Series

1 products, and therefore that earlier versions of A10's code likely contain more evidence of
2 verbatim copying, while later versions of the AX Series software have been edited to largely
3 remove verbatim copies of Brocade's code. The Court largely granted Brocade's motion to
4 compel, and ordered that A10 produce the prerelease source code immediately (although it
5 appeared, based on A10's counsel's statements, that A10 might not have collected such code yet).
6 In light of A10's noncompliance with two previous Court orders regarding source code production,
7 the Court also ordered appointment of a special master to oversee collection of prerelease source
8 code from A10.

9 Brocade has introduced disturbing evidence of potentially copied code in A10's AX Series
10 source code, and A10 has failed to respond to this evidence with any explanation. This evidence
11 might be enough to support a finding of likelihood of success on the merits. However, given the
12 fact that Brocade has not met its burden to show irreparable harm, the equities and the public
13 interest do not favor an injunction. Until Brocade carries its burden to show a likelihood of
14 irreparable harm, the Court cannot issue an injunction. Therefore, Brocade's application is
15 DENIED without prejudice.

16 **IT IS SO ORDERED.**

17 Dated: August 16, 2011

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19 LUCY H. KOH
20 United States District Judge
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